



# FEDERAL ELECTION COMMISSION

Washington, DC 20463

## MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel KCS

DATE: February 29, 2000

SUBJECT: MUR 4759-General Counsel's Report #2

The attached is submitted as an Agenda document for the Commission Meeting of \_\_\_\_\_

Open Session \_\_\_\_\_

Closed Session \_\_\_\_\_

### CIRCULATIONS

SENSITIVE

☒

NON-SENSITIVE

☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

### DISTRIBUTION

COMPLIANCE

☒

Open/Closed Letters ☐

MUR ☐

DSP ☐

STATUS SHEETS ☐

Enforcement ☐

Litigation ☐

PFESP ☐

RATING SHEETS ☐

AUDIT MATTERS ☐

LITIGATION ☐

ADVISORY OPINIONS ☐

REGULATIONS ☐

OTHER ☐

FEB 29 2000

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

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Phillip J. Maloof

MUR 4759

Friends of Phil Maloof and Dolores Gonzáles,  
as treasurer

Supporters of Phil Maloof and Theresa Keaveny,  
as treasurer

2000 FEB 29 P 1:22

**SENSITIVE**

GENERAL COUNSEL'S REPORT #2

I. **ACTIONS RECOMMENDED:** Reject Respondents' request to take no further action and dismiss this matter, determine to enter into conciliation with Respondents prior to findings of probable cause to believe, and approve the attached proposed joint conciliation agreement.

II. **BACKGROUND**

On March 23, 1999, the Federal Election Commission found reason to believe that Phillip J. Maloof violated 2 U.S.C. § 432(e)(1) by failing to timely file a Statement of Candidacy; and that Friends of Phil Maloof and Dolores Gonzáles, as treasurer, and Supporters of Phil Maloof and Theresa Keaveny, as treasurer, violated 2 U.S.C. § 441d(a) by failing to place appropriate disclaimers on certain mailers, fundraising invitations and outdoor advertising.<sup>1</sup>

Respondents were notified of the Commission's findings on March 31, 1999, and the two Respondent Committees were requested to provide information regarding the quantities and costs of the mailers, invitations and advertising in question. Signed responses to the Commission's inquiries were received on May 20, 1999. A response to the Commission's reason to believe findings, asking that the Commission dismiss the matter and take no further action against the Respondents, was received on May 27, 1999.

<sup>1</sup> Collectively, Phillip J. Maloof, Friends of Phil Maloof and Dolores Gonzáles, as treasurer, and Supporters of Phil Maloof and Theresa Keaveny, as treasurer, will be referred to as "Respondents." The Respondents are all represented by the same counsel.

### III. ANALYSIS

#### 1. Respondents' Discovery Responses

Respondent Committees have provided the following information in response to the discovery requests.<sup>2</sup> As to the flyers accompanying the absentee ballot requests sent to potential voters in May 1998, and the invitations to the June 17, 1998 fundraiser, Friends of Phil Maloof bore no responsibility. Attachment 1 at 2-4. Friends of Phil Maloof expended \$885 with regard to the yard signs, which was half of the total cost of these items, and half of the production, a total of 15 signs. *Id.* at 3. With respect to the flyers accompanying the absentee ballot requests sent to potential voters in May 1998, Supporters of Phil Maloof expended \$42,079.90; 120,000 mailers were produced and 108,000 of these were mailed. *Id.* at 5. With regard to the invitations to the June 17, 1998 fundraiser, Supporters of Phil Maloof expended an estimated \$1,618.33 for approximately 3,000 invitations, all of which were distributed. *Id.* at 6-7. Supporters of Phil Maloof expended \$885 with regard to 15 yard signs. *Id.* at 5-6.

#### 2. Response to the Commission's Reason to Believe Findings

In Respondents' response to the Commission's reason to believe findings, Attachment 2, counsel argues that, with regard to Phil Maloof's failure to timely file the Statement of Candidacy, the appropriate form was filed 13 days after it was due, that Mr. Maloof did not know the form had been filed late, that it is not clear what harm would have resulted from the late filing such that it would warrant the use of scarce Commission resources to pursue the matter, and that the public was adequately informed of Mr. Maloof's candidacy by his public announcement. Attachment 2 at 1-2. Counsel further alleges that Mr. Maloof is being treated disparately, as compared to incumbent Members of Congress who are notified by letter by the Reports Analysis

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<sup>2</sup> Respondents' submissions are attached at Attachment 1.

Division that they appear to have exceeded the \$5,000 threshold, and are allowed to submit their Statements of Candidacy late. *Id.* at 2.

Regarding the Commission's reason to believe findings with respect to the Respondent committees and their treasurers, counsel repeats some of the same contentions made in the response to the complaint. While not disputing that the materials in question failed to include the required disclaimers, counsel contends that most of the materials distributed by the committees contained the relevant disclaimers, so that the items in issue were exceptions, and that because the items contained information that would give notice to the reader of who was the sponsoring entity, that there never was any doubt as to who was responsible for distributing the items. *Id.* at 3; see First General Counsel's Report dated March 11, 1999 at 6, 8, 12-14.

In the response to the Commission's reason to believe findings, counsel also submitted letters from a consultant (Tom Hujar of FDR Services, Inc.) who was retained to "manage the campaign's operations" and another consultant (Susan Burnside of Burnside & Associates) who was hired to design, print and distribute the fliers mailed along with the absentee ballots. Mr. Hujar's letter states that he had been hired by both Maloof campaigns to manage their operations. *Id.* at 8. In that capacity, he hired Burnside & Associates to supervise the drafting, printing and mailing of the sample absentee ballots which ultimately did not contain a proper disclaimer. *Id.* Addressing the yard signs, Mr. Hujar states that once "we" realized that the proper disclaimers were missing, disclaimers were put on the signs within 10 days. *Id.* With respect to both the mailers and the yard signs, Mr. Hujar states that the mistakes were inadvertent, and that neither the candidate nor the campaign staff saw the mailing before it was sent out. *Id.* He accepts full responsibility for the mistakes. *Id.*

Ms. Burnside's letter acknowledges that the absentee mailers sent to Democratic primary voters did not contain the required disclaimer. *Id.* at 9. Ms. Burnside further states that her staff determined that the most economical way to include the disclaimer was to laser it onto the printed page when the personalization process took place. *Id.* She states that it is her understanding that the laser shop was instructed to do so, although she has no written documentation of that fact. *Id.* She further states that when the setups were proofed, neither her staff nor Tom Hujar detected that the disclaimer was not included, and the absentee form was mailed without it. *Id.* Ms. Burnside states that "our vendor was completely at fault for this error but we ultimately didn't catch the error." *Id.* She apologizes and accepts full responsibility for the mistake. *Id.* Ms. Burnside notes that her firm produced three other mailers for the Maloof campaign, each of which had the proper disclaimer. *Id.*

Respondents' counsel also submitted an affidavit from "an unpaid advisor" to the candidate and his campaigns, James H. Koch, which states that he was asked by "the Campaign" to investigate.<sup>3</sup> Mr. Koch states that Mr. Hujar alone reviewed the mailing before it went out, and that neither the candidate nor his campaign staff did. Likewise, F.D.R. Services, under the direction of Mr. Hujar or his wife, designed, produced and distributed the yard signs and the invitations. Mr. Koch further avers that "[a]fter the special election, Phil Maloof instructed me to discharge F.D.R. Services, Inc., Mr. Tom Hujar and Ms. Dia Hujar. The primary reason for this dismissal was their inappropriate handling of the aforementioned items." In the response, counsel points to MURs 4842, 4154 and 3739 as examples of instances in which the Commission

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<sup>3</sup> The May 1998 mailing of absentee ballot applications was apparently handled in a manner inconsistent with New Mexico law, causing the campaign to request Mr. Koch's investigation into the origin of the absentee ballots.

has taken into consideration the fact that someone outside the campaign was at fault for absent disclaimers and taken no further action.

### **3. Discussion of Respondents' Arguments**

Regarding the candidate's failure to timely file his Statement of Candidacy, 2 U.S.C. § 432 does not require that the Commission ascertain a specific "harm" resulting from a failure to file a Form 2 prior to enforcing this portion of the Act. Further, having publicly announced his candidacy for Federal office, it is not clear why Mr. Maloof would need to be informed by the Commission that he was a "candidate." See 2 U.S.C. § 431(2) (definition of "candidate"). It was his responsibility to see that the Statement of Candidacy was filed. Moreover, although Respondents complain about disparate treatment when incumbent Members of Congress are notified by Commission staff that they have exceeded the \$5,000 threshold for becoming a candidate, it must be remembered that Commission staff is only able to make that determination because they are able to review reports of receipts and disbursements filed by the incumbents' committees, an opportunity not present in the case of Mr. Maloof. These reports are also available to the public.

With regard to the arguments repeated from the response to the complaint, these arguments are no more persuasive the second time around. The law requires disclaimers on certain items, and the fact that they are present on most does not excuse their absence from others. Moreover, the Commission need not prove "public confusion," and for that matter, the Respondents' claim that the public was not confused does not establish that fact. See *e.g.*, *FEC v. National Conservative Political Action Committee*, No. 85-2898 (D.D.C. April 29, 1987) (unpublished opinion) ("the Act and regulations do not provide for disclaimers by inference"). See also MUR 4416 (Hamilton for Congress) (enforcement action where it was doubtful that the

public was confused as to the origin of the advertisements). Further, no "intent" is required to violate the Act's disclaimer requirements, and the Commission routinely enforces section 441d(a) regardless of the "intent" of the party committee or its consultant or its printer or whether the mistake was made by the committee, the consultant or the printer. *See e.g.*, MUR 4741 (Mary Bono Committee) (enforcement action where respondent indicated that lack of disclaimer was due to printer error and offered to "provide [the Commission] with copies of the conforming mailers as well as statements of the campaign consultant and printer if necessary"); MUR 3682 (Fox for Congress Committee) (enforcement action where respondents submitted invoice and sworn statement from printer indicating omission was printer's error). Here, Respondents do not even claim that the materials contained the proper disclaimer when they were submitted to the printer. Further, as F.D.R. Services, Inc. was hired by both campaigns to manage their operations, and as Mr. Koch states that Mr. Hujar, senior partner of the firm, reviewed the mailings and he or his wife were responsible for the yard signs and the invitations, the campaigns cannot credibly claim that they were completely free from blame for the errors.

Nor are Respondents' citations to past Commission actions persuasive. In MURs 4154 and 3739, the communications involved appeared in an independent weekly magazine and an independent daily newspaper, respectively. The respondents in both of these matters demonstrated that they had provided ad copy which contained appropriate disclaimers to the publications, and that the publications unilaterally eliminated the disclaimers before they published the communications. Moreover, the respondents in those matters had no opportunity to review the revised communications prior to their publication. In MUR 4842, which was generated by a *sua sponte* complaint, the respondents alleged that a mailer with an appropriate disclaimer had been provided to the printer, and that the campaign had "signed off" on the mailer,

so that the mailer with the disclaimer was the last document that the campaign saw or had control over.<sup>4</sup>

Thus, the Respondents' arguments accompanying their request for the Commission to dismiss this matter and take no further action do not support that result. Because the Commission is now in possession of sufficient information to determine what occurred and what costs were involved, this Office recommends that the Commission offer to enter into conciliation with Respondents prior to findings of probable cause to believe.

#### IV. DISCUSSION OF CONCILIATION PROVISIONS AND CIVIL PENALTY

Attached is a proposed joint conciliation agreement

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<sup>4</sup> In MUR 4842, this Office noted, in the First General Counsel's Report dated October 20, 1998, that if the campaign did provide a copy of the mailer to the printer with a disclaimer, and if the campaign did not have a chance to review the finished product before it was mailed, "then neither the Committee nor the Committee's primary vendor had an opportunity to correct the mistake." This Office recommended that the Commission find reason to believe that the committee and its treasurer violated 2 U.S.C. § 441d(a)(1), but also informed the Commission that this Office intended to explore whether the respondents' explanation was accurate through informal discovery. This Office believed that once that informal discovery was completed, that we would have been in a better position to recommend what further action, if any, should be taken. The Commission found reason to believe that a violation had occurred, but also determined to take no further action and closed the file in that matter, concluding that, given the Commission's limited resources, the matter did not warrant further action.



Accordingly, this Office recommends that the Commission approve the attached proposed conciliation agreement.

**V. RECOMMENDATIONS**

1. Reject the request of Phillip J. Maloof, Friends of Phil Maloof and Dolores Gonzáles, as treasurer, and Supporters of Phil Maloof and Theresa Keaveny, as treasurer, to take no further action and close this matter.
2. Enter into conciliation with Phillip J. Maloof, Friends of Phil Maloof and Dolores Gonzáles, as treasurer, and Supporters of Phil Maloof and Theresa Keaveny, as treasurer, prior to findings of probable cause to believe.
3. Approve the attached proposed joint conciliation agreement and the appropriate letter.

Lawrence M. Noble  
General Counsel

Date

2/28/00

BY:



Lois G. Lerner  
Associate General Counsel

**Attachments**

1. Informal Discovery Responses
2. Response to Commission's Reason to Believe Findings
3. Proposed Conciliation Agreement

Staff assigned: Tony Buckley



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

FROM: MARY W. DOVE/VENESHE FEREBEE-VINES *VHV*  
COMMISSION SECRETARY

DATE: MARCH 2, 2000

SUBJECT: MUR 4759 - General Counsel's Report #2  
dated February 28, 2000.

The above-captioned document was circulated to the Commission

Tuesday, February 29, 2000.

Objection(s) have been received from the Commissioner(s) as  
indicated by the name(s) checked below:


Commissioner Elliott	<u>XXX FOR THE RECORD</u>
Commissioner Mason	—
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	—
Commissioner Wold	—



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

MEMORANDUM

TO: Lawrence M. Noble  
General Counsel

FROM: Mary W. Dove/Lisa R. Davis  
Acting Commission Secretary 

DATE: March 3, 2000

SUBJECT: MUR 4759 - General Counsel's Report  
dated February 28, 2000.

The above-captioned document was circulated to the Commission  
on Tuesday, February 29, 2000.

Objection(s) have been received from the Commissioner(s) as  
indicated by the name(s) checked below:

Commissioner Elliott	—
Commissioner Mason	—
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	—
Commissioner Wold	—

XXX FOR THE RECORD